No. 12-3800

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STATE OF MICHIGAN, ET AL.,
Plaintiffs-Appellants,

and

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,
Intervenor-Plaintiff-Appellant
v.

UNITED STATES ARMY CORPS OF ENGINEERS; METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,
Defendants-Appellees,

and

CITY OF CHICAGO, ET AL.,
Intervenors-Defendants-Appellees.

Appeal from the U.S. District Court for
the Northern District of Illinois
(Hon. John J. Tharp, Jr.)

Brief For Appellee The United States Army Corps of Engineers

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JURISDICTIONAL STATEMENT

The Plaintiffs-Appellants are the States of Michigan, Wisconsin, Minnesota, and Ohio, and the Commonwealth of Pennsylvania.[1] The jurisdictional summary in the States' brief is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the factual allegations in the States' complaint are sufficient to state a cognizable claim for public nuisance where the Corps is operating and maintaining the navigational link between the Great Lakes and the Mississippi River basin in accordance with congressional directives, and where Congress has expressly prohibited the Corps from taking the actions that the States assert are necessary to prevent the nuisance.

2. Whether Congress has waived the United States' sovereign immunity for public nuisance claims seeking injunctive relief.

3. Whether Congress has displaced the common law of public nuisance by speaking directly to the issue of the Corps' operation of the structures over which it has control and by speaking directly to the measures the Corps may take to control Asian carp.

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[1] The States' jurisdictional statement also lists as an appellant the intervenor Grand Traverse Band of Ottawa and Chippewa Indians, Op. Br. 1, but the Grand Traverse Band has not filed a brief and the signature block of the States' brief does not include counsel for the Grand Traverse Band, Op. Br. 62-64. In any event, the Grand Traverse Band does not make any arguments in addition to those made by the States.

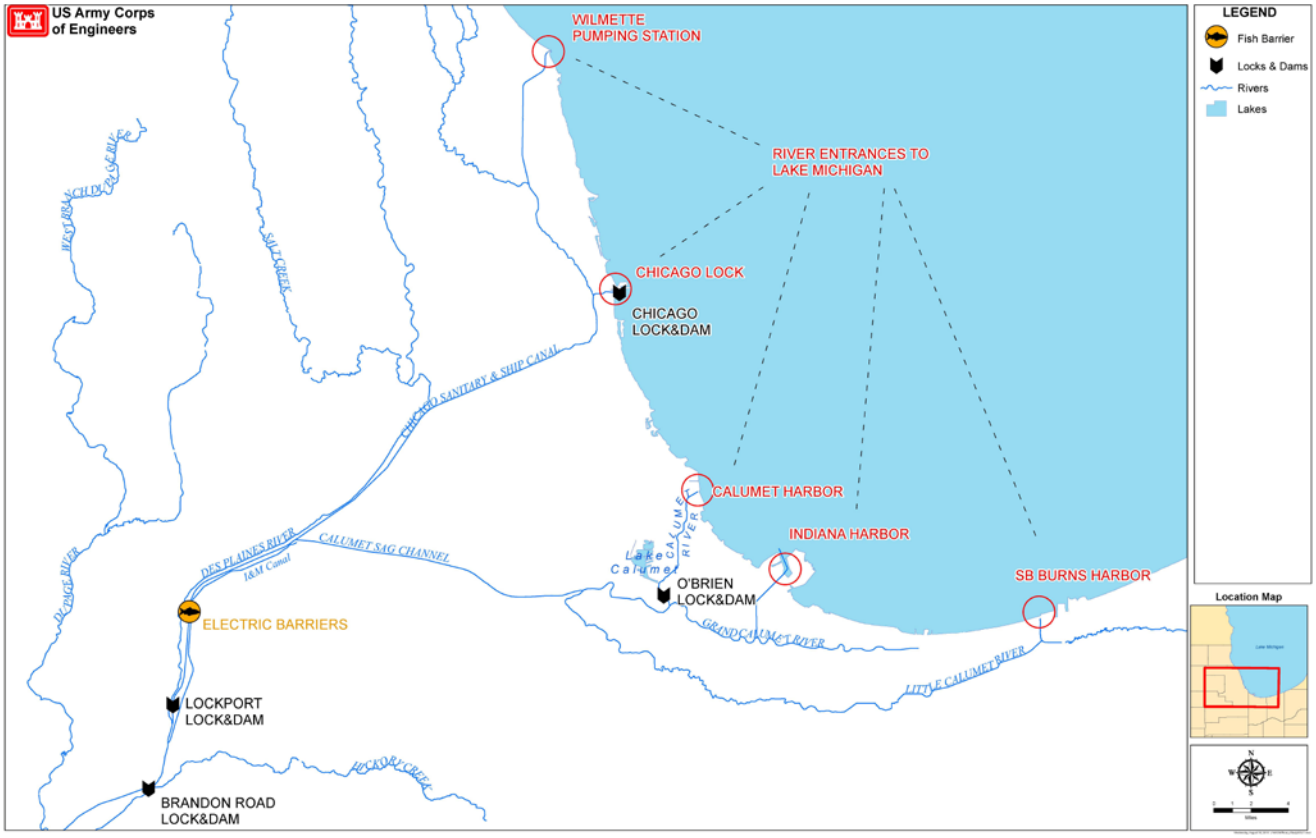
STATEMENT OF THE CASE

Michigan, Wisconsin, Minnesota, Ohio, and Pennsylvania claim that the United States Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago have created a public nuisance. The Corps is alleged to have done so by operating locks and related structures in the Chicago Area Waterway System in the way that Congress instructed the Corps to operate those structures—for navigation, flood control, and water diversion. The States contend that the Corps' operation of those structures will allow two invasive species of Asian carp to migrate from the Mississippi River basin through the Chicago Area Waterway System and establish a population in Lake Michigan, which would harm the Great Lakes' ecosystem and the States' economies. But Congress, the Corps, and numerous other federal and state agencies are aware of the problem Asian carp pose and are taking active measures to prevent their spread into Lake Michigan. The States, unsatisfied with those measures, ultimately seek a permanent injunction requiring the Corps to develop and implement plans to permanently separate the Mississippi River basin from Lake Michigan. App. at 36. The district court dismissed the complaint for failure to state a claim because the Corps' actions are fully authorized by statute, and the relief requested by the States is precluded by statute. S. App. 45, 47. This appeal followed.

STATEMENT OF FACTS

I. The Chicago Area Waterway System

Lake Michigan is connected by a series of manmade and natural water bodies called the Chicago Area Waterway System, or CAWS, to the Des Plaines River, which flows into the Illinois River, which in turn flows into the Mississippi River. The CAWS generally serves three purposes: it provides a navigation link between Lake Michigan and the Mississippi River; it provides a means of flood control for the Chicago metro area; and it provides an outlet for storm water and effluent from Chicago. The following is a map of the CAWS and related facilities:



The Corps' primary mission at the CAWS and the larger Illinois Waterway has long been to create, operate, and maintain a navigational link between the Great Lakes and the Mississippi River basin. *E.g.*, Rivers and Harbors Act of 1930, Pub. L. No. 71-520, 46 Stat. 918, 929; S. Doc. No. 71-126, at 5 (1930) (recommending to Congress that "there should be a Federal Waterway as the connecting link between the Mississippi River System of waterways and the Great Lakes system via the Illinois River, the Des Plaines River, the Chicago River"). Consistent with that mission, the Corps currently operates several facilities in the CAWS. In particular, Congress has charged the Corps with operating the Chicago Sanitary and Ship Canal and related facilities to "sustain through navigation from Chicago Harbor on Lake Michigan to Lockport on the Des Plaines River." Act of July 30, 1983, Pub. L. No. 98-63, tit. I, ch. IV, 97 Stat. 301, 311; *see also* Act of Dec. 4, 1981, Pub. L. No. 97-88, tit. I, § 107, 95 Stat. 1135, 1137. That includes the Chicago Harbor Lock and Chicago River Controlling Works, or Chicago Lock for short. The Chicago Lock sits at the confluence of the Chicago River and Lake Michigan and regulates the flow in the Chicago Sanitary and Ship Canal.

The Corps also operates a second lock in the CAWS, the Thomas J. O'Brien Lock and Dam, or O'Brien Lock, which is on the Calumet River and regulates the flow of that river and the Calumet-Sag Channel. The Corps owns and operates the O'Brien Lock for navigation, flood control, and water

diversion. Pub. L. No. 79-525, 60 Stat. 634, 636 (1946). The Corps also owns the lock's sluice gates but it operates them at the direction of the Water District.

II. Factual Allegations in the Complaint Related to Asian Carp and the CAWS

Because the district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6), this Court must accept as true the factual allegations in the complaint for purposes of appeal. *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011). The relevant allegations are as follows: The CAWS establishes a hydrological link between the Mississippi River basin and Lake Michigan, and therefore fish and other species could migrate from one to the other, including the two species of fish of particular concern in this case, silver carp and bighead carp. App. 7-10. Those species, native to Asia (and thus referred to collectively as Asian carp), can adapt to a variety of environments and can spread rapidly, crowding out native species where the carp are successful. App. 10-11. Asian carp have spread from the lower Mississippi River basin north to the Illinois River and other rivers in the basin. App. 11-12. If Asian carp were to become established in the Great Lakes, they would present a "grave threat of environmental and economic harm." App. 12.

The complaint does not allege that the Corps is operating structures in the CAWS negligently or in a manner inconsistent with their purpose and

normal operation. Instead, the complaint simply alleges that Asian carp could spread, on their own, from the Mississippi River basin to Lake Michigan through the hydrological connection established by the CAWS as "created, operated and maintained by the [Water] District and the Corps." App. 7-10. The complaint thus alleges that there is a "risk" that Asian carp "have and will migrate into Lake Michigan," a risk that exists "precisely because the District created and implemented the diversion project and because the District and the Corps are maintaining and operating the infrastructure of that project in a manner that allows those fish to migrate from the Illinois River into Lake Michigan." App. 30.

The complaint does not allege that the Corps is indifferent to the spread of Asian carp. Instead, the complaint alleges that the Corps, in cooperation with other federal and state agencies, has undertaken "well-intentioned" efforts to prevent the spread of Asian carp, but that those efforts have been "insufficient." App. 14. Those efforts have included, as alleged in the complaint, creation of an electric barrier system to prevent the northward movement of carp; testing of waters in the CAWS for Asian carp DNA;[2] applying the fish poison rotenone where agencies determined it was warranted; targeted fishing; development of an Asian Carp Control Strategy

[2] The States refer to eDNA results that post-date the complaint, Op. Br. n.5, but the results reported must be interpreted by appropriate experts and are of course irrelevant to whether the complaint states a claim upon which relief can be granted.

Framework; and participation in the multi-agency Asian Carp Regional Coordinating Committee (which also includes all of the Plaintiff States). App. 14-21.[3]

The States thus claim that the creation of—and failure to entirely prevent—the risk that Asian carp will migrate through the normal operation of the CAWS is an unreasonable interference with a public right and thus a public nuisance. App. 30. For relief, the States sought several forms of preliminary injunctive relief (which were denied), and they ultimately seek an order declaring that the Corps' actions constitute a public nuisance and entering a permanent injunction requiring the Corps to "expeditiously develop and implement plans to permanently and physically separate carp-infested waters in the Illinois River basin and the CAWS from Lake Michigan." App. 36.

III. Procedural History

Starting in December of 2009 the State of Michigan, followed by the rest of the Plaintiff States, began requesting that the Corps and other agencies take actions beyond those they were already taking to control the spread of Asian carp. App. 17-21. They repeatedly sought injunctive relief in the United

[3] Though not directly relevant to the motion to dismiss, the extensive efforts undertaken by the Corps and other federal and state agencies to control Asian carp both before and after the initiation of this lawsuit were detailed in this Court's prior opinion in this case, *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765 (2011), and have continued apace since then.

States Supreme Court, which denied such relief and declined to entertain Michigan's action. *Wisconsin v. Illinois*, 130 S. Ct. 2397 (2010); 130 S. Ct. 1934 (2010); 130 S. Ct. 1166 (2010). In July of 2010, the States filed this lawsuit claiming that the Corps has created a public nuisance through its operation of the Chicago and O'Brien Locks and similarly violated the APA. Ultimately the States want the Corps to permanently separate the Mississippi River Basin from the Great Lakes. App. 36.

The States immediately moved for a preliminary injunction. After accepting briefing on the motion, considering voluminous testimony through affidavits and a three-day evidentiary hearing, and hearing oral argument from counsel, the district court denied the motion. Dckt. No. 155. The States appealed, and this Court affirmed the denial of a preliminary injunction, concluding that the balance of harms weighed against injunctive relief. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765 (2011).

The Corps then moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim on which relief can be granted. The district court concluded that the States had failed to state a claim against the Corps because the Corps' operation of the structures in the CAWS to support navigation was fully authorized and required by statute and thus the Corps' operation could not constitute an "unreasonable" interference with a public right, even accepting all of the States' allegations as true. S. App. 23-36. The

district court similarly concluded that the relief requested by the States—physical separation of the basins—would violate the Rivers and Harbors Act, 33 U.S.C. § 401, which prohibits the placement of barriers in canals or navigable rivers without congressional approval.

The court concluded, however, that the States might be able to state a claim by seeking relief that would not be precluded by statute, and it initially dismissed the complaint without prejudice to allow the States to file an amended complaint if they chose to do so. S. App. 36-37. The States chose instead to file a notice that they would not be filing an amended complaint. The court therefore dismissed the complaint with prejudice. S. App. 47. This appeal followed.

SUMMARY OF ARGUMENT

I. To state a claim for public nuisance, the States must allege facts on which the court could find that the Corps has unreasonably interfered with a public right. Actions authorized by statute are not unreasonable. Here, the States allege that the public nuisance is the routine operation of the structures in the CAWS to maintain a navigational link between the Great Lakes and the Mississippi River basin. Congress, in a series of statutes starting in the late 1800s, most notably in 1930, 1946, 1981, and 1983, has required the Corps to create, operate, and maintain that navigational link. Congress has also prohibited the Corps from taking the actions necessary to

end that navigational link without approval from Congress in further legislation. The Corps is not alleged to have acted in any way inconsistent with Congress's directions. Its actions are therefore reasonable and the district court correctly dismissed the States' public nuisance claim.

The States also contend that the Corps' failure to complete a plan for hydrologic separation is itself a cause of a public nuisance. But the factual allegations in the complaint do not support that contention and the States admit that completing such a plan would not in and of itself prevent the alleged public nuisance as further congressional action would be necessary before the Corps could act. The district court therefore correctly concluded that allegations related to a plan for hydrologic separation did not support the States' public nuisance claim. In any event, since the complaint, Congress has required the Corps to expedite a report on a plan for hydrologic separation and thus any public nuisance claim based on the Corps' failure to prepare such a report is moot.

II. The district court's judgment may also be affirmed on the alternate ground that the United States has not waived its sovereign immunity to a federal common law claim for public nuisance. The Administrative Procedure Act waives sovereign immunity for claims seeking injunctive relief against the United States, but the waiver does not apply where another statute consents to suit but expressly or impliedly forbids injunctive relief. The

Federal Tort Claims Act grants consent to suit for tort claims seeking monetary relief but does not waive sovereign immunity for claims seeking injunctive relief. Therefore neither it nor the APA provides a waiver of sovereign immunity here and the complaint must be dismissed.

III. The district court's judgment may also be affirmed on the alternate ground that Congress has displaced the federal common law in this area. The States ask this Court to oversee the operation of the structures in the CAWS, and ultimately to require the Corps and the Water District to cease operation altogether. Congress, however, has recognized and taken action to combat the problem of aquatic invasive species in the Great Lakes and Mississippi River basins, but Congress has done so while leaving in place the statutory mandate to operate the CAWS structures in the interest of navigation between those basins. Congress has therefore spoken directly to the issue and displaced the federal common law.

ARGUMENT

I. Standard of Review

This Court reviews de novo the district court's dismissal of the States' complaint under Rule 12(b)(6). *Peters v. West*, 692 F.3d 629, 632 (7th Cir. 2012). In reviewing the sufficiency of a complaint, the Court takes as true all of the factual allegations in the complaint and draws all reasonable inferences from those facts in the plaintiff's favor. *Killingsworth v. HSBC*

Bank Nev., N.A., 507 F.3d 614, 618 (7th Cir. 2007). To survive a Rule 12(b)(6) motion to dismiss, the complaint first must comply with Rule 8(a) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief," such that the defendant is given "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the "speculative level." *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555-56, 569, n.14). "[D]etailed factual allegations" are not required, but the plaintiff must allege facts that "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555, 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

II. The States' complaint fails to state a claim for public nuisance against the Corps.

Count I of the States' complaint, the only count which the States contend on appeal was improperly dismissed, Op. Br. 20 n.8, claims that the Corps has created a public nuisance in violation of the federal common law by operating structures in the CAWS to maintain a navigational connection between Lake Michigan and the Des Plaines River, and thus the Mississippi

River basin. The alleged nuisance is thus based on the Corps' actions (the operation and maintenance for navigation of the Chicago Lock and related facilities and the O'Brien Lock) and inaction (the failure to erect barriers in the CAWS to achieve hydrological separation from Lake Michigan). App. 30. But maintaining navigation between Lake Michigan and the Des Plaines River is required by statute, and erecting barriers in the waterway is prohibited by statute. Under general common law nuisance principles, and certainly under the more circumscribed federal common law, actions of a federal agency carrying out delegated authority consistent with statutory requirements are reasonable and cannot give rise to a cognizable claim for public nuisance. The district court therefore correctly dismissed the States' claim.

A. To state a claim, the States must allege facts sufficient to show an unreasonable interference with a public right.

For any federal common law public nuisance claim, the first issue analytically is whether the plaintiffs' particular nuisance theory states a valid claim under recognized principles of federal common law. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535-37 (2011). While the general common law definition of public nuisance is the starting point for determining whether a complaint states a cognizable claim, the federal common law does not encompass every public nuisance claim conceivable under state common law. The Supreme Court has been careful to caution that

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). The Court noted that it has been necessary to develop the federal common law only "in a 'few and restricted' instances." *Id.* at 313 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). In *American Electric Power*, the Supreme Court again cautioned that federal courts must "remain[] mindful" that they do "not have creative power akin to that vested in Congress." 131 S. Ct. at 2536. Thus, the Supreme Court has never "held that a State may sue to abate any and all manner of pollution originating outside its borders." *Id. American Electric Power* therefore makes clear that the federal common law of public nuisance is "specialized federal common law" that only applies in limited, more circumscribed contexts than state-court developed common law notions of public nuisance.

Keeping that important limitation in mind, when addressing common law claims, the federal courts generally begin by looking at the relevant Restatement and other secondary sources and apply "the traditional common-law technique of decision." *Am. Elec. Power*, 131 S. Ct. at 2536-37 (quoting *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1353 (Fed. Cir. 2001) (en banc). Here, as this Court recognized in the

preliminary injunction appeal in this case, a "public nuisance is defined as a substantial and unreasonable interference with a right common to the general public, usually affecting the public health, safety, peace, comfort, or convenience." *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d at 771 (citing Restatement (Second) Torts § 821B (1979); Dan B. Dobbs, *The Law of Torts* § 467, at 1334 (2000)).

Thus, to state a claim, the States must allege facts demonstrating the Corps' *unreasonable* interference with a public right. Actions that are authorized by statute are reasonable and thus, by definition, fall outside the realm of public nuisance. *See* Restatement (Second) of Torts § 821B cmt. f ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.").[4] As explained in the next section,

[4] *See also Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1914) (noting "the legislature may legalize what otherwise would be a public nuisance"); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423-24 (1940) ("[Congress'] judgment as to whether a structure [within a navigable waterway] is or is not a hindrance is conclusive."); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 426 n.33 (1946) (describing how Congress "overturned" the Supreme Court's determination that a bridge obstructing navigation constituted a public nuisance); *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981) ("Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government."); *North Carolina v. TVA*, 615 F.3d 291, 310 (4th Cir. 2010) ("TVA's plants cannot logically be public nuisances . . . where TVA is in compliance with [the applicable regulatory and statutory mandates]"); *Committee for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976) (en banc) ("[I]t would be an anomaly to

Congress has repeatedly instructed the Corps to operate and maintain the relevant structures in the CAWS to maintain navigation between the Great Lakes and Mississippi River basin, and it has expressly prohibited erecting barriers to navigation in the waters of the United States. The Corps' actions are therefore reasonable and cannot be a public nuisance.

B. The Corps is required by statute to operate and maintain the structures in the CAWS for navigation, it is prohibited from erecting structures to end navigation, and its actions are therefore reasonable.

The States allege that the Corps has acted unreasonably by operating structures in the CAWS for navigation, thereby providing a hydrological link between the Illinois Waterway and Lake Michigan through which Asian carp may travel. App. 30. The States do not allege that the Corps' operation or maintenance of those structures has been negligent. Nor do they allege that the Corps' operation and maintenance of those structures has been in any way inconsistent with the authorized purposes of the structures. Because Congress has instructed the Corps to operate and maintain the structures for, among other things, navigation, the States have failed to allege that the Corps has acted unreasonably. *Cf. Nat'l Wildlife Fed'n v. U.S. Army Corps of Engr's*, 384 F.3d 1163, 1178-80 (9th Cir. 2004) (holding Corps did not violate the Clean Water Act where violations of state water quality standards were

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hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates.").

caused by existence of dam and Corps could not take "action that would nullify the purpose of the federal dams").

1. The Corps' actions are fully authorized and required by statute and are therefore reasonable.

Congress has charged the Corps with operating and maintaining structures in the CAWS for navigation. Since 1822 the federal government has been invested in a navigational connection between Lake Michigan and the Mississippi River basin. *See Wisconsin v. Illinois*, 278 U.S. 367, 401-07 (1929) (documenting early history of federal involvement). The Illinois River and its tributaries have therefore long been improved to support navigation. By 1920, the federal government had established a 200-foot wide, 9-foot deep channel from Utica, Illinois, to the mouth of the Illinois River at the Mississippi River, and had other projects to support navigation in the Chicago and Calumet Rivers. S. Doc. No. 71-126, at 1. The components of that system were connected by a series of non-federal projects, including the Chicago Sanitary Canal (which would later become the Chicago Sanitary and Ship Canal). *Id.* In 1921, the State of Illinois began constructing the "the final link of this waterway system," known as the Illinois Waterway, which included four locks and dams along the Des Plaines and Illinois Rivers and a fifth lock connecting to the Chicago Sanitary Canal. *Id.* at 2. Before it finished the Illinois Waterway, Illinois ran up against a state constitutional cap on the amount of money it could spend on the project. *Id.* at 2-3. Congress

instructed the Corps to prepare a report on whether the federal government should step in and complete the project, and in 1930 the Chief of Engineers provided that report. S. Doc. No. 71-126.

In the course of preparing that report, the Secretary of War, concerned about recommending the expenditure of federal funds to complete a state waterway, asked the Attorney General about federal authority over the completed waterway. The Attorney General's opinion, included in Senate Document 71-126, concluded that the federal government would have plenary control over the waterway and could "provide for and insure to the public perpetual, free navigation" in the completed waterway. *Id.* at 68.

The Chief of Engineers, incorporating a District Engineer report, ultimately recommended that Congress authorize the federal government to complete the waterway. The Chief of Engineers noted that the waterway would potentially move 7,500,000 tons of cargo annually, and the United States would be justified in funding the project "to obtain such a link connecting the extensive Federal waterway systems of the Great Lakes and the Mississippi Valley." *Id.* at 3. The Board of Engineers for Rivers and Harbors also prepared a report recommending approval of the project, on the condition that Illinois pronounce the resulting system "to be free and unobstructed waterways forever dedicated to free public use for navigation." *Id.* at 5. Thus, the Chief of Engineers recommended that "there should be a

Federal Waterway as the connecting link between the Mississippi River System of waterways and the Great Lakes system via the Illinois River, the Des Plaines River, the Chicago River," and other waterways. *Id.* at 5. And he recommended that "the project thus adopted shall be in all its parts a navigable waterway of the United States, forever free to the public use of all, unencumbered by any tolls or restrictions of any kind whatsoever except such as may be imposed by Congress." *Id.* at 6.

Congress agreed. In the 1930 Rivers and Harbors Act, Pub. L. No. 71-520, Congress "adopted and authorized" the improvement "in accordance with the plans recommended" by the Chief of Engineers "and subject to the conditions set forth in his report." 46 Stat. at 918, 929. In doing so, Congress provided that that the project must be constructed to use the smallest flow of water necessary to develop "a commercially useful waterway." *Id.* And it provided that water required by the Supreme Court's opinion in *Wisconsin v. Illinois*, 281 U.S. 179 (1930), "is hereby authorized to be used for the navigation of said waterway." 46 Stat. at 929. The Corps therefore completed the waterway precisely to provide a navigational channel. Thus, there is no doubt that the Corps designed, Congress approved expending federal funds to create, and

the Corps built a navigational link between the Great Lakes and the Mississippi River basin.[5]

Congress continued authorizing improvements to the waterway to support that navigational link. In the 1946 Rivers and Harbors Act, 60 Stat. at 636, Congress adopted and authorized a plan submitted by the Chief of Engineers for improvements to navigation in the Illinois Waterway, including construction of the O'Brien Lock in the CAWS. *See* H.R. Rep. No. 79-677 (1946). The Chief of Engineers' report adopted the District Engineers' plan, which recommended construction "in the Calumet River just north of its junction with the Little Calumet River"—the location of the O'Brien Lock—"a lock of suitable dimensions for *barge navigation*, with necessary control works to prevent reversals of flow and to regulate water levels and water diversion." H.R. Rep. No. 79-677, at 52 (emphasis added). The primary purposes of the O'Brien Lock are therefore to support navigation, regulate water levels, and provide for water diversion. And the construction of the O'Brien Lock was only one of seven recommendations approved by Congress in the 1946 Act, each of which was designed to improve navigation in the

[5] Congress had also previously acted several times to ensure the continued operations and maintenance of the Chicago River for navigation. *See* Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121, 1156; Rivers and Harbors Act of 1902, ch. 1079, 32 Stat. 331, 363; Rivers and Harbors Act of 1907, ch. 2509, 34 Stat. 1073, 1102; Rivers and Harbors Act of 1919, ch. 95, 40 Stat. 1275, 1283.

Illinois Waterway by, for example, deepening and widening the channel or removing low-crossing bridges that impeded navigation. *Id.*

The Corps continued to operate structures in the Illinois Waterway, including the O'Brien Lock, in the interest of navigation for the next 35 years. Then, in two statutes, one enacted in 1981 and the other in 1983, Congress added other structures in the Illinois Waterway to the Corps' navigational mission. In 1981, Congress provided that the Corps was to make available money from its operation and maintenance funding to "operate and maintain the Chicago Sanitary and Ship Canal portion" of the Illinois Waterway "in the interest of navigation." Energy and Water Development Appropriations Act of Dec. 4, 1981, Pub. L. No. 97-88, tit. I, § 107, 95 Stat. 1135, 1137. As the House Report explained, the 1930 Rivers and Harbors Act, described above, had "provided clear authority for the Corps of Engineers to construct, operate and maintain that portion of the Illinois Waterway from Lockport downstream to Utica," but it was less clear about the Corps' role with respect to the Chicago Sanitary and Ship Canal. H.R. Rep. No. 97-177, at 51 (1982). Thus, the "language in the bill is to specify clearly that operation and maintenance of the Chicago Sanitary and Ship Canal in the interest of navigation is likewise a Federal responsibility." *Id.* But the federal responsibility for the Canal does not extend past navigation—operation and

maintenance "for sanitation and other purposes shall remain a non-Federal responsibility." *Id.*

In 1983, Congress expanded the federal responsibility over the Chicago Sanitary and Ship Canal to include "the Control Structure and Lock in the Chicago River" and related facilities "as are necessary *to sustain through navigation* from Chicago Harbor of Lake Michigan to Lockport on the Des Plaines River." Supplemental Appropriations Act of July 30, 1983, Pub. L. No. 98-63, tit. I, ch. IV, 97 Stat. 301, 311 (emphasis added). The House Report explained that the "intent was to make it clear to the Corps of Engineers that their *historic responsibilities for navigation* on the Illinois waterway encompassed the entire waterway from Grafton, Illinois on the Mississippi River to Chicago Harbor on Lake Michigan." H.R. Rep. No. 97-850, at 145 (1983) (emphasis added). Thus, Congress transferred the operation and maintenance responsibilities of the Chicago Lock to the Corps. Since the passage of those statutes and the resultant transfer of responsibility for operating and maintaining those structures to the Corps, the Corps has operated and maintained those structures to support navigation. The Corps has not in any way acted outside of its statutory mandates, and the States have not alleged otherwise.

In sum, the history of the federal involvement in the Illinois Waterway and the CAWS has been to build, operate, and maintain the waterway

primarily to serve the interest of navigation between the Great Lakes and the Mississippi River. The Corps has done nothing in this case but carry out that responsibility in accordance with the explicit instructions of Congress. The States do not allege that the Corps has created a public nuisance by any means other than preserving and operating the link between the two basins for navigation or that there are measures the Corps could adopt short of ending navigation that would abate the nuisance. The States have therefore failed to allege that the Corps has acted unreasonably and the district court correctly dismissed the claim.

2. The Corps is prohibited by statute from ending navigation, and its failure to do so is therefore reasonable.

In addition to arguing that the Corps' operation for navigation is unreasonable, the States also necessarily allege that the Corps' failure to sever the hydrological connection between the Great Lakes and Mississippi River basins is an unreasonable omission giving rise to a public nuisance. App. 30. But in the Rivers and Harbors Act, Congress has prohibited any party, including the Corps or the Water District, from constructing a dam that would sever the navigational connection between the Great Lakes and Mississippi River basins without Congressional approval:

> [i]t shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the

> building of such structures shall have been obtained and until the plans for . . . (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army.

33 U.S.C. § 401. It is well-established that the Rivers and Harbors Act governs the CAWS. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 485-86 (1960) (applying section 10 of the Rivers and Harbors Act to the Calumet River and noting that Congress addressed the absence of common law prohibiting obstructions to navigable rivers by passing the Act), and that the Corps and the Water District are bound by the Rivers and Harbors Act's prohibition on constructing dams without congressional consent. *See United States v. Arizona*, 295 U.S. 174, 183-84 (1935) ("Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others."). Therefore, "section 9 unquestionably makes 'consent of Congress' essential to the valid authorization of" any dam, including the ones sought by the States here. *Id.*; *see also Hart & Miller Islands Area Envtl. Grp., Inc. v. Corps of Eng'rs*, 621 F.2d 1281, 1289-91 (4th Cir. 1980) (section 9 of the River and Harbors Act applies to "structures [that] completely span a waterway"). Congress has therefore barred the Corps or the Water District from constructing a dam to achieve hydrological separation of the Great Lakes and Mississippi River basins without Congressional consent.

The States fail to set forth any congressional authorization that would permit the Corps or the Water District to separate the basins. Indeed, recently, Congress explicitly noted that it would be inappropriate for the Corps to undertake such hydrologic separation of the Great Lakes and Mississippi River basins prior to completion of the Great Lakes Mississippi River Interbasin Study. H.R. Rep. No. 112-331, div. B, tit. I, at 835 (2011) (Conf. Rep.) ("The conferees do not consider hydrologic separation of the Great Lakes Basin from the Mississippi River Basin to be an emergency measure authorized by this Act. The issue should be fully studied by the Corps of Engineers and considered by the appropriate congressional committees."). The Corps' compliance with the Rivers and Harbors Act's prohibition on constructing such dams without Congressional authorization is entirely reasonable and therefore cannot form the basis of a public nuisance claim.

In sum, the States' public nuisance claims must be dismissed where Congress has authorized the Corps' current maintenance of the navigational connection between the two basins and explicitly prohibited the Corps from completely severing that connection by constructing a dam or dams. The Corps' actions to maintain navigation and failure to sever the basins are therefore entirely reasonable. The States have failed to state a claim under

the federal common law of public nuisance. The district court's judgment should be affirmed.

C. None of the States' arguments are persuasive.

In their brief on appeal, the States present strained readings of the statutes governing operation of the structures in the CAWS to argue that the Corps' operation of the CAWS for navigation is not required. But the States are incorrect, and none of their arguments explain why the courts should employ the federal common law to override an agency's actions taken consistent with its statutory authority. They also argue that the Corps' allegedly unreasonable failure to provide a plan for hydrologic separation is itself a cause of the public nuisance. But a plan is not a prerequisite for congressional consent under section 9 of the Rivers and Harbors Act, and even if a plan were completed Congress would not necessarily authorize the separation. Regardless, any public nuisance claim based on the Corps' failure to complete a plan for hydrologic separation is moot after passage of the Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, div. A, tit. I, subtit. E, § 1538, 126 Stat. 405, 586 (2012).

1. The States frame the issue incorrectly.

The States begin by attempting to frame the issue as whether the Corps is "fully authorized" to operate the CAWS for navigation, by which they mean the Corps is required by statute to do so to the exclusion of all other

considerations. Op. Br. 30-32, 34, 37, 39-40, 43-45. If the statutes do not require uninterrupted navigation, they contend, the Corps could interrupt it, and is acting unreasonably by failing to do so. But the States approach the issue from the wrong direction. The question under public nuisance law is whether the States have alleged facts that would show that the Corps has acted, or failed to act, to create an unreasonable interference with a public right. Lawful conduct of a federal agency that is within the agency's purview and specifically authorized by statute is not unreasonable; in other words, the conduct of a federal agency does not have to be *required* by statute to be reasonable, it is enough if a statute authorizes the conduct. *See supra* n.4.

Here, there is no dispute that the Corps is at the very least authorized to operate the CAWS for navigation between Lake Michigan and the Mississippi River basin (though the States vastly understate the impact of Congress's enactments). As the States concede, "Congress intended to facilitate navigation in parts of the Illinois waterway and was willing to fund activities that would benefit [navigation]." Op. Br. 39. Yet the States nevertheless contend that the Corps has acted unreasonably in maintaining navigation consistent with that congressional intent and authorization.

In essence, then, the States would have the federal common law, operating outside of the normal review of final agency action under the APA, create an affirmative duty requiring the Corps to take positive action to close

the waterway, even where the Corps is acting well within its delegated authority in keeping the waterway open for navigation. While the federal common law may be available to fill in statutory interstices, *see Am. Elec. Power*, 131 S. Ct. at 2536, it is not, given its limited nature, a tool for plaintiffs and courts to direct how a federal agency is to act within its delegated authority, particularly when the very conduct complained of is directly authorized by statute. The States would have the courts declare unreasonable that the Corps has acted consistent with Congress's direction and the Corps' statutory authority. Whatever the scope of the federal common law of public nuisance, it does not extend that far.

2. Congress has required the Corps to operate and maintain the CAWS for navigation between the basins.

Even accepting the States' framing of the issue, the Corps is fully authorized and required by statute to maintain navigation between the basins and has no authority to take the actions the States would have it take. The States do not address the 1899, 1902, 1907, 1919, or 1930 Rivers and Harbors Acts and the historical overriding navigational purpose of the waterway. With respect to the 1946 Rivers and Harbors Act, the States quote the bare statutory language adopting the Chief of Engineers' report and assert, without more, that the statute is not a legal mandate to sustain navigation because the statutory language does not include the word "navigation." Op. Br. 38-39. But the purposes of the projects Congress

provided for in the 1930 and 1946 Rivers and Harbors Acts, as laid out in the plans "adopted and authorized" by Congress, are the requirements of the statutes themselves and cannot simply be ignored by the Corps or the courts. As the Eleventh Circuit has explained, where Congress states in a Rivers and Harbors Act, as it has here, that a project it authorizes is to be "prosecuted . . . in accordance with the report of the Chief of Engineers," and that report incorporates a report of the District Engineer, both of those reports become "part of the authorizing legislation for the project." *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160, 1168 (11th Cir. 2011). Thus, the authorizing statute and its underlying reports "serve as the baseline for the Corps' authority to operate" the project, and declining to operate the project for its authorized purposes may be contrary to the statute. *Id.* at 1186-97.

As we have explained, the reports incorporated into the both the 1930 and 1946 Rivers and Harbors Acts, and thus made a part of the governing law, explicitly provided that a primary purpose of the projects Congress authorized is navigation. S. Doc. No. 71-126, at 5-6; H.R. Rep. No. 79-677, at 52. Indeed, the Chief of Engineers report adopted in the 1930 Rivers and Harbors Act included the recommendation that the waterway be approved precisely because it established a navigational link between the Great Lakes and the Mississippi River basin, and "shall be in all its parts a navigable waterway of the United States, forever free to the public use of all,

unencumbered by any tolls or restrictions of any kind whatsoever except such as may be imposed by Congress." S. Doc. No. 71-126, at 5-6 (emphasis added). The States would have the courts, and not Congress, impose a restriction on the navigation of the waterway in direct contradiction to that congressional mandate. That a court cannot do. *See Okla. ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941) ("It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of inter-state commerce as to warrant it.").

The States also contend that the 1981 and 1983 statutes are merely appropriations bills and thus do not require conduct and have no effect beyond the year in which they were enacted. Op. Br. 32-39. In making the argument, the States rely on the presumption that appropriations bills apply only in the year they are enacted, *Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224-26 (1st Cir. 2003), but that presumption can be overcome where, as here, the circumstances demonstrate that Congress intended to enact law having broader effect, *id*. at 224 ("[T]he presumption against permanence in appropriation bills can be overcome if Congress clearly expresses its intention to create permanent law or if the nature of the provision would make any other interpretation unreasonable."). The States argue that the presumption is not overcome here because Congress used the word "hereinafter" instead of

"hereafter" in the 1981 Act, and thus the statute lacks a "word of futurity." Op. Br. 32-36 (citing *Atl. Fish Spotters*, 321 F.3d at 225-26).

The States are mistaken. Given the nature of the provisions, it would be unreasonable to interpret those acts as doing anything except creating a permanent transfer of authority to the Corps to operate and maintain the Chicago Lock and Chicago Sanitary and Ship Canal for navigation. The Corps had long operated and maintained other parts of the Illinois Waterway for navigation, and the addition thus fits squarely within the Corps' mission in the area. The appropriations made did not expire at the end of the fiscal year, but were "to remain available until expended," 95 Stat. at 1135, demonstrating that the corresponding responsibility to use those funds to operate and maintain the Chicago Lock and the Chicago and Sanitary Ship Canal to sustain through navigation extended beyond the end of the fiscal year. *Atl. Fish Spotters*, 321 F.3d at 229. And the very existence of the 1983 Act, which refers back to the 1981 Act to specify that the substantive language used in 1981 includes the Chicago Lock, demonstrates that the requirements of both acts were meant to persist beyond the year in which they were enacted.

Further, in the legislative history of both statutes, Congress made clear that it was adding those structures to be permanently within the Corps' purview and precisely for navigation. H.R. Rep. No. 97-177, at 51; H.R. Rep.

No. 97-850, at 145; *cf. Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 53, 63 (2004) (looking to legislative history as an aid in interpreting "less-than-meticulous drafting" of a statute). Congress thus added structures to the projects the Corps was already required to operate and maintain for navigation under the 1930 Act, and explicitly invoked the navigational purpose in doing so. Congress has in subsequent legislation explicitly recognized that it permanently transferred to the Corps the responsibility to operate and maintain those structures. *See* Pub. L. No. 104-303, tit. III, § 320, 110 Stat. 3658, 3716 (1996).[6] Therefore, the Corps is also required to operate and maintain those structures for navigation.

Moreover, since 1983 the Corps has consistently expended appropriated funds for navigation at those structures, without Congress reenacting the language from the 1981 or 1983 Acts specifying that the Corps may use appropriations to operate and maintain those structures, and without protest from Congress or anyone else. *Atl. Fish Spotters*, 321 F.3d at 227 ("[I]n the course of interpreting appropriations bills, courts may compare enactments in one year to corresponding enactments in other years . . . to determine

[6] "The project for navigation, Chicago Harbor, Lake Michigan, Illinois, for which operation and maintenance responsibility was transferred to the Secretary under chapter IV of title I of the Supplemental Appropriations Act, 1983 (97 Stat. 311), and section 107 of the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1137), is modified to direct the Secretary to conduct a study to determine the feasibility of making such structural repairs as are necessary to prevent leakage through the Chicago Lock and the Thomas J. O'Brien Lock, Illinois . . . ."

whether Congress believed it necessary to reenact the same provision from year to year."). Congress has thus continued to provide the Corps with appropriated funds for the Illinois Waterway using the normal process for funding navigational projects, in which Congress appropriates a sum of money to be used for all navigational projects and specifies in an accompanying Conference Report line items for each project. *See*, *e.g.*, Energy and Water Development and Related Agencies Appropriations Act, 2012, Pub. L. 112-74, div. B, tit. I, 125 Stat. 786, 853 (2011) ($2.4 billion for operation, maintenance, and care of existing authorized navigation projects) and H.R. Rep. No. 112-331, at 816 (Conf. Rep.) ($31 million for Illinois Waterway). While the line items in the Conference Reports are not binding, the Corps reports each year how such funds are actually allocated to various projects. *See* 33 U.S.C. §§ 556, 2295; Annual Report Fiscal Year 2011 of the Secretary of the Army on Civil Works Activities at 22-4 (2012).[7] At no point has Congress questioned the Corps' expenditure of appropriated funds to operate and maintain those structures for navigation. Thus, even the States do not fully embrace the natural implication of their argument and do not contend that the Corps is prohibited from spending money to operate and maintain the Chicago Lock or Chicago Sanitary and Ship Canal for

[7] *Available at* http://cdm16021.contentdm.oclc.org/cdm/compoundobject/collection/p16021coll6/id/22

navigation after the 1981 appropriations have been exhausted or that the Corps has misspent congressional appropriations for nearly thirty years.

All of the circumstances show that the only reasonable interpretation of the 1981 and 1983 Acts is that they transferred to the Corps the responsibility to operate and maintain those two structures for navigation. Congress's use of the word "hereinafter" instead of "hereafter," if not itself evidence of the permanence of the statutory requirements, does nothing to call that permanence into question. In any event, given all the other circumstances, it is clear that Congress meant to use the word hereafter, and its use of hereinafter instead was one of the rare congressional scrivener's errors that courts may correct. *See Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 142 (1995) (Ginsburg, J., concurring) ("Correcting a scrivener's error is within this Court's competence") (citing *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) (correcting misplaced punctuation marks)); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1097 (9th Cir. 2006) (collecting cases). Operating and maintaining the CAWS for navigation between the Great Lakes and the Mississippi River is required by statute.

Of course, the Corps has some operational flexibility at its projects, but the Corps is the agency charged with carrying out that flexibility and receives

great deference in its operational choices. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1030-31 (8th Cir. 2003). In exercising that flexibility, the Corps would have no warrant to take steps to completely eliminate a project purpose specifically adopted by Congress, as set forth in the relevant Engineer reports. *See In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d at 1186-97. This Court similarly could not order the Corps to ignore the statutory mandates to operate the projects for navigation and instead order an end to navigation. *Klene v. Napolitano*, 697 F.3d 666, 668 (7th Cir. 2012) ("Judges must not order agencies to ignore constitutionally valid statutes."); *Nat'l Wildlife Fed'n*, 384 F.3d at 1178-80. Congress instructed the Corps to build, operate, and maintain the CAWS to provide a navigational link between the Great Lakes and the Mississippi River that is "unencumbered by any tolls or restrictions of any kind whatsoever." S. Doc. No. 71-126 at 5-6. The Corps is therefore required to, in the words of the 1983 Act, "sustain through navigation," until it is instructed by Congress to do otherwise, 97 Stat. at 311, and neither the Corps nor the courts may override Congress's statutory requirements. The States' arguments to the contrary fail.

In arguing that the Corps is acting unreasonably by maintaining the navigational link and that the Corps should, either on its own or as ordered by the courts, act to end that navigational link, the States also fundamentally misunderstand both when a federal agency can take action and the limits of

the federal common law. A basic principle of administrative law is that agencies can only "act" within the bounds of congressionally delegated authority. *See La. Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it. . . . An agency may not confer power on itself."). Likewise, the Supreme Court has made clear that a federal court may not assume or infer that it has the same remedial authority as a common law court. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.") (citation omitted). Moreover, at best, "common law precedents" may be used only "to a degree" as a filler of gaps left by a statute. The States must first point to statutory authority applicable to the Corps and authorizing the agency to take the actions the States seek before invoking a common law duty to act. There is no such authority in this case.

Thus, while the States acknowledge the existence of the operation and maintenance statutes for the CAWS, they claim that events have overtaken the Congressional directives to maintain the waterway for navigation, and insist the Corps must affirmatively act based on common law duties to close the waterway. App. 30, 35-36. But Congress has not amended the operation and maintenance statutes to provide for permanent closure of the waterway.

Likewise, changing circumstances do not override congressional directives or equate to a gap for common law to fill in. The States are simply incorrect about what sources of law can dictate affirmative action that must be taken by a federal agency. The federal common law of public nuisance is not one of them, at least insofar as a federal agency is acting consistent with its statutory authorization. Indeed, as the Ninth Circuit has held, even other statutory directives must give way where Congress has explicitly chosen to build a dam or other improvement and the very existence of the project causes the inconsistency with the other statutory requirements. *Nat'l Wildlife Fed'n*, 384 F.3d at 1178-80.

The States make one other argument on this point that requires brief response. For each statutory provision they address, the States argue that the provision does not explicitly authorize the passage of Asian carp. Op. Br. 33-34, 38, 39-40. True, but irrelevant. The question is whether the Corps has unreasonably created the conditions by which Asian carp may move, on their own, into the Great Lakes by maintaining the navigational link with the Mississippi River basin. Because the Corps is authorized and required by statute to maintain that navigational link, it cannot have unreasonably created those conditions. For the States' claims to fail, Congress need not have passed a statute blessing Asian carp migration; Congress need only have authorized the Corps' conduct that is alleged to result in the nuisance.

See Restatement (Second) of Torts § 821B cmt. f ("Although it would be a nuisance at common law, *conduct* that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability."); *supra* n.4. Congress has authorized (in fact, required) the Corps' conduct here, and thus the States have failed to state a claim against the Corps.

3. The States offer no effective response to the Rivers and Harbors Act's prohibition on erecting structures in navigable waterways.

The complaint asks the district court to enter an order requiring the Corps to "develop and implement plans to permanently and physically separate carp-infested waters in the Illinois River basin and the CAWS from Lake Michigan." App. 36. As we have explained, the Corps is not acting unreasonably by failing to separate the basins—and thus the complaint does not state a claim for public nuisance—because the Rivers and Harbors Act *prohibits* the Corps from doing so without Congress's consent. 33 U.S.C. § 401. The district court similarly concluded that the complaint failed to state a claim because the relief requested is prohibited by statute and the courts cannot order Congress to pass legislation approving a project for hydrological separation without running afoul of the Constitution's separation of powers. S. App. 29-30 & n.16.

On appeal, the States do not explain how the failure to implement hydrological separation could be unreasonable, and thus the cause of a public

nuisance, when it cannot be accomplished without congressional action. Instead, they seem to admit that the ultimate relief sought in the complaint would require congressional action and could not itself be ordered by the district court or this Court without creating serious separation of powers concerns, Op. Br. 51, 57-60, and instead fall back to the complaint's request for relief short of hydrologic separation; that is, that the Corps "develop" the plans to do so, *id.* at 52-57. As explained below, that cannot save the States' complaint.

4. The States fall back to their claims seeking preliminary relief and an expedited GLMRIS, but that cannot save their case.

a. The failure to complete GLMRIS on the State's preferred timeframe is not a cause of any public nuisance.

The States argue that their complaint requested as relief several measures that are within the Corps' control, such as certain preliminary relief and, in particular, their request that the Corps expedite the Great Lakes Mississippi River Interbasin Study, or GLMRIS, to provide a report on hydrological separation. Thus, the States argue, because all of the relief sought in the complaint is not prohibited by law, the district court should not have dismissed their complaint. Op. Br. 52-57. But the States focus on the wrong question and the wrong part of the complaint.

The question here is not whether every facet of the relief requested is available or precluded, but whether the factual allegations in the complaint

establish "grounds" for the "entitlement to relief." *Twombly*, 550 U.S. at 555. Thus, the district court concluded that the complaint alleged that maintenance of the waterway for navigation caused the alleged public nuisance, and that the complaint did not allege that the Corps' "failure to take only those [intermediate] actions [short of hydrological separation] is sufficient to create the risk that the carp will reach the lake." S. App. 36. In other words, the Corps' alleged failure to, for example, use the fish poison rotenone more often or to expedite GLMRIS were not alleged by the States to be the "cause of the risk" of the alleged public nuisance. *Id.* at 36-37. They were not the alleged actions or failures to act that unreasonably interfered with a public right and *caused* the nuisance, but were instead actions or failures to act that, in the words of the complaint, "refused or neglected *to abate* the nuisance" until the cause of the nuisance could be addressed. App. 19 (emphasis added). As the district court concluded, those allegations do not suffice to state a claim for public nuisance on their own. S. App. 36-37. The district court gave the States leave to amend if they wished to allege that something short of the failure to hydrologically separate the basins caused the public nuisance, but the States declined.

On appeal, the States argue that the district court erred because the Corps' failure to complete GLMRIS on their preferred time frame and submit it to Congress is a proximate cause of the "Asian carp invasion of the Great

Lakes." Op. Br. 57. But they do not point to any factual allegation in the complaint to support the argument made on appeal. Instead, the complaint mentions GLMRIS or a plan for hydrological separation eight times: once in describing the relief the States unsuccessfully sought in the Supreme Court, App. 18, twice in describing relief the States sought from the Corps in the administrative process, App. 19, once in describing the Corps' rejection of that relief, App. 20, three times in describing the Corps' plan to complete an interim version of the study in 2012, App. 22, 23, 26, and once in describing the Corps refusal to commit to "any acceleration of its previously announced schedule," App. 26. Nowhere does the complaint allege or even imply that the Corps' failure to complete GLMRIS quicker was itself a cause of the alleged public nuisance. Instead, the complaint alleges under Count I, the public nuisance claim, that the cause of the nuisance was the creation of the CAWS and its continued maintenance and operation "in a manner that allows [Asian carp] to migrate from the Illinois River into Lake Michigan." App. 30. The claims related to expediting GLMRIS appear not in the public nuisance count, but in Count II, the APA claim, as an alleged unlawful failure to act that "contribute[s] to the *maintenance* of a common law public nuisance," not as a cause of the nuisance itself. App. 33 (emphasis added). The States have not appealed the dismissal of the APA claim. Op. Br. 20 n.8. The complaint

then seeks relief requiring the Corps to complete GLMRIS within 18 months. App. 35.

Drawing all reasonable inferences in favor of the allegations in the complaint, the complaint alleges that the routine operation and maintenance of the CAWS creates an unreasonable interference with a public right and is a public nuisance. It does not allege that the failure to timely complete a study that is one necessary step in abating the alleged nuisance is itself an unreasonable interference with a public right and thus, standing alone, the cause of a public nuisance. And that makes sense because, as the district court concluded, completing GLMRIS will not itself stop the Asian carp (or increase the chances of stopping them)—further action by Congress authorizing hydrologic separation and appropriating funds to achieve that purpose would be necessary. If completing GLMRIS will not stop Asian carp, the converse is also true—the failure to complete GLMRIS in the States' preferred time frame (or to take any of the other preliminary measures sought by the States) cannot itself be a stand-alone cause of any nuisance. S. App. 29, 36-37. Thus, the complaint's claims related to GLMRIS correctly appear in the APA claim, not the public nuisance claim.

The States are also wrong to suggest that the Corps' completion of the study is a necessary precondition to Congress passing legislation authorizing hydrological separation and thus is itself a cause of the public nuisance. Op.

Br. 53 ("Until the Corps develops such a plan, there will be nothing for Congress to consent to, and nothing to be implemented."). Section 9 of the Rivers and Harbors Act requires both congressional authorization and a plan approved by the Corps, but it does not require one to come before the other. 33 U.S.C. § 401 (providing it is unlawful to build obstructions to navigable waterways "until the consent of Congress to the building of such structures shall have been obtained and until the plans . . . shall have been submitted to and approved by the [Corps].") Though the usual course is for the Corps to develop plans, which Congress approves, Congress is of course free to pass a statute requiring hydrological separation with the plans for that separation to be later developed, approved by the Corps, and implemented without further congressional action. Indeed, section 9, standing alone, only requires that plans for dams or dikes be approved by the Corps, it does not even require that the Corps be the entity to develop them. And even if the Corp developed the plans, there is no guarantee Congress would authorize hydrologic separation and appropriate funds to implement that separation. The Corps' alleged failure to provide a plan for hydrologic separation through GLMRIS on the States' preferred timeframe therefore cannot be a cause of the public nuisance.

b. A public nuisance claim based on GLMRIS is now moot in any event.

Regardless, any public nuisance claim based on allegations of the Corps' refusal to proceed with GLMRIS in the States' preferred time frame is now moot because Congress has by statute required the Corps to submit the GLMRIS report by January 6, 2014, and to address hydrologic separation in that report. While pursuing this lawsuit, the Plaintiff States (and 10 others not a party to this lawsuit) also sought relief from Congress by asking it to enact a statute requiring the Corps to accelerate GLMRIS. Dckt. No. 237. Congress then passed and the President signed into law the Moving Ahead for Progress in the 21st Century Act, 126 Stat. at 586, which requires the Corps to expedite GLMRIS, submit a study report within 18 months of enactment, and focus the study on, among other things, "permanent hydrological separation of the Great Lakes and Mississippi River Basins." *Id.* The Corps is currently engaged in intensive study to meet that deadline, and it will include hydrologic separation as one of the alternatives in the GLMRIS report.

The Progress Act moots the States' claim seeking to expedite GLMRIS. The central inquiry in any mootness analysis is whether the court may grant effective relief. Here, the States requested the court to order the Corps to "expeditiously develop" plans to permanently separate the basins, which the States asserted should be completed in an 18-month timeframe, App. 35-36.

Congress has required the Corps to expedite GLMRIS and to focus the study on "permanent hydrological separation." 126 Stat. at 586. The district court could not employ the federal common law to override Congress's decision and impose a shorter timeframe than that required by Congress. And any longer timeframe would be ineffective relief because the Corps is already including hydrologic separation as part of the expedited GLMRIS report. Thus, the enactment of legislation provided the States with the relief they sought and ends any controversy related to that relief. *See Fed'n of Adver. Indus. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) (noting that "repeal, expiration, or significant amendment to challenged legislation ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief"); *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002) (holding "if the amendment provides sufficient relief to the plaintiff, the claim becomes moot"); *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 153, 160-61 (D.C. Cir. 1982) (dismissing petition as moot where petitioner had "received all the relief he sought").

The district court thought that the Corps might miss the statutory deadline and thus the States' requested relief, if ordered, might end up being effective. S. App. 28 n.15. There are two problems with that conclusion. First, there is no "just-in-case" exception to mootness allowing the issuance of relief that is ineffective when granted. Second, presuming that such relief might be

necessary reverses the normal presumption that agencies proceed with regularity and in compliance with the law. The Corps has a statutory deadline and, for purposes of the mootness analysis, the court must presume that the Corps will act in accordance with that deadline, not that it will fail to do so. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies"); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965) (noting "the presumption to which administrative agencies are entitled—that they will act properly and according to law"). Thus, any claim related to expediting GLMRIS based on the federal common law is moot.

III. The States' public nuisance claim is barred by sovereign immunity.

In the preliminary injunction appeal in this case, the Corps argued that the States were not likely to succeed on the merits of their public nuisance claim because the claim was barred by sovereign immunity. This Court disagreed, but it should reconsider that decision in light of new Supreme Court precedent clarifying the scope of the APA's waiver of sovereign immunity, and in particular 5 U.S.C. § 702(2). *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). This Court can revisit a clear issue of law resolved at the preliminary injunction stage "if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous," *Santamarina v.*

Sears, Roebuck & Co., 466 F.3d 570, 572 (7th Cir. 2006), and it should do so here.

Though the APA waives sovereign immunity for lawsuits "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority," by its terms the APA does not apply when "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702(2). The Federal Tort Claims Act is such a statute: it grants consent to lawsuits for money damages sounding in tort, but it excludes any other relief sought. Because the FTCA was passed before the APA, and against the backdrop of complete sovereign immunity to tort actions, the FTCA "impliedly forbids" injunctive relief. Congress did not authorize tort actions for injunctive relief at the time, and it therefore reserved the United States' existing immunity to those suits. The States' suit alleging a grievance sounding in tort but seeking injunctive relief is therefore barred by sovereign immunity.

In the prior appeal, this Court disagreed and held that the States' public nuisance claim is not barred by sovereign immunity because the APA waives the United States immunity to the claim. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d at 775-76 (citing 5 U.S.C. § 702). This Court concluded that the Corps' argument "reads too much into congressional silence" and that the

FTCA lacks any "express language or fair implication" that Congress meant to preclude injunctive relief for tort action. *Id.* The Court went on to conclude that because in FTCA lawsuits the courts must apply state law, the FTCA does not authorize suit for "*any* federal common-law tort claim" and "if the FTCA could never apply to the type of claim advanced, then there is no reason to think it implicitly forbids a particular type of relief for a claim outside its scope." *Id.*

Since this Court's decision, the Supreme Court has clarified the scope of the APA's waiver of sovereign immunity as it relates to other statutes granting consent to suit that forbid the relief sought (there, the Quiet Title Act; here, the FTCA). Rather than focus narrowly on the "type of claim" brought, in *Patchak* the Supreme Court held that sovereign immunity is waived under the APA only where the competing substantive statute that forbids the relief sought "addresses a kind of grievance different from the one" the plaintiff advances. 132 S. Ct. at 2205-06. There, the Supreme Court considered the Quiet Title Act, which authorizes suits by plaintiffs asserting "a right, title, or interest" in real property that conflicts with a similar interest claimed by the United States, but "does not apply to trust or restricted Indian lands." *Id.* The United States had taken land into trust for an Indian tribe. Patchak brought an APA claim seeking to set aside as ultra vires the final agency action acquiring land in trust on behalf of the tribe.

The Court held that because Patchak did not assert a dispute over a competing real property interest, the Quiet Title Act was "not addressed to the type of grievance which the plaintiff seeks to assert." *Id.* at 2207-08. Therefore the Quiet Title Act's reservation of the waiver of sovereign immunity to suits challenging the United States title to trust lands did not apply to Patchak's APA suit, which could proceed. *Id.* But the Quiet Title Act's prohibition would have applied if the plaintiff had brought a different kind of claim that nevertheless asserted a competing real property interest. *Id.* at 2205.

This Court should reconsider its decision that sovereign immunity does not bar the States' action here to take into account the Supreme Court's decision in *Patchak*. *Santamarina*, 466 F.3d at 572. The States' grievance here is a tort grievance—that the Corps had created a public nuisance through routine operation of the CAWS for navigation. Unlike in *Patchak*, that is exactly the type of grievance that the FTCA was passed to address. But in granting consent to tort lawsuits for damages, Congress withheld authorization for injunctive relief to redress tort grievances. 28 U.S.C. § 1346(b). By withholding the authority to grant injunctive relief to redress tort grievances, the FTCA impliedly forbids that relief, and the APA's waiver of sovereign immunity therefore does not apply to suits seeking injunctive relief

to redress tort grievances. 5 U.S.C. § 702(2). Under the test announced in *Patchak*, sovereign immunity bars the States' public nuisance claim.

And it makes no difference that the States' suit is based on the federal common law rather than state law. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d at 776. As the decision in *Patchak* makes clear, the identity of the grievance matters for the sovereign immunity analysis; neither the source of law available to redress the grievance nor the viability of the claim under the statute ought to affect the analysis. Because the FTCA's waiver of sovereign immunity does not extend to claims based on federal law, the United States "simply has not rendered itself liable" in cases where "federal law, not state law, provides the source of liability." *FDIC v. Meyer*, 510 U.S. 471, 478 (1994). That Congress intended to rule out federal common law as the law applicable in tort cases against the United States does not support allowing such a common-law claim to proceed merely because it seeks injunctive relief instead of damages to redress the same underlying tort grievance. Under *Patchak*, it is the underlying grievance that matters in the analysis.

IV. Congress has displaced the federal common law.

Finally, this Court should also reconsider its previous conclusion that Congress has not displaced the federal common law in this area, and it may affirm on that alternate basis. Since this Court's decision, Congress passed

the Progress Act, which further demonstrates the displacement of the federal common law and warrants revisiting that conclusion.

The Supreme Court has clarified that the "test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue." *Am. Elec. Power*, 131 S. Ct. at 2537 (quotation and alteration marks removed; citation omitted). A "statute speaks directly to the question at issue" if it delegates authority to an agency to resolve that question; it is not necessary that either Congress or the agency have resolved the question comprehensively or in the way that the plaintiff seeks. *Id.* at 2538 ("[T]he delegation is what displaces federal common law.").

The States ask this Court to oversee the operation of the structures in the CAWS, and ultimately to require the Corps and the Water District to cease operation altogether. But Congress has directly spoken to the operation of the structures in the CAWS: Congress has recognized and taken action to combat the problem of aquatic invasive species in the Great Lakes and Mississippi River basins, and it has done so while leaving in place the statutory mandate to operate the CAWS structures in the interest of navigation between those basins. Specifically, Congress has told the Corps to operate the structures in the CAWS in support of navigation, flood control, and water diversion. *See*, *e.g.*, 46 Stat. at 929 (Illinois Waterway); 95 Stat. at 1137 (Chicago Sanitary

and Ship Canal); 97 Stat. at 311 (Chicago Lock); 60 Stat. at 636 (O'Brien lock). And it has prohibited the Corps from constructing a dam or dams severing the navigational connection between the Great Lakes and Mississippi River basins without Congressional authorization. 33 U.S.C. § 401. Congress has also recognized the problem of aquatic invasive species in the Great Lakes and Mississippi River basins and charged the Corps with investigating solutions that can be incorporated into ongoing operations of the CAWS. *See* 16 U.S.C. § 4722(i)(3)(A) & (B)(ii). Congress has mandated that the Corps construct, upgrade, operate, and maintain the electric barrier system and study long term solutions to "prevent" the spread of Asian carp and other invasive species. *See* Water Resources Development Act, Pub. L. No. 110-114, tit. II, § 3061(b)(1), (d), 121 Stat. 1041, 1121 (2007).

Furthermore, Congress has delegated authority to the Corps specific to the particular problem of aquatic nuisance species in these basins. Congress has directed the Corps to build the electric barrier, to study its efficacy and to take "emergency measures . . . to prevent aquatic nuisance species from dispersing into the Great Lakes by way of any hydrologic connection between the Great Lakes and the Mississippi River Basin." 125 Stat. at 856-57. But those measures to do not include immediate hydrological separation. H.R. Rep. No. 112-331, div. B, tit. I, at 835 (Conf. Rep.) ("The conferees do not consider hydrologic separation of the Great Lakes Basin from the Mississippi

River Basin to be an emergency measure authorized by this Act."). In the same vein, Congress has required the Corps to conduct "a feasibility study of the range of options and technologies available to prevent the spread of aquatic nuisance species between the Great Lakes and Mississippi River Basins through the Chicago Sanitary and Ship Canal and other aquatic pathways." 121 Stat. at 1121. And in the Progress Act, Congress required the Corps to expedite that study, focus it on the hydrological separation of the basins, and provide a report to Congress within 18 months, but it did not authorize that separation. 126 Stat. at 586.

Importantly, the displacement analysis does not turn on whether Congress has "address[ed] every issue" in a comprehensive manner, *Mobil Oil v. Higginbotham*, 436 U.S. 618, 625 (1978); *accord Am. Elec. Power*, 131 S. Ct. at 2536-37, or whether the agency adopts solutions that the States would prefer. In *Mobil Oil*, federal common law was displaced by one phrase in a provision of the Death on the High Seas Act, 46 U.S.C. § 762 (1976) (now 46 U.S.C. § 30303). Because the statute "sp[oke] directly to [the] question at issue," it displaced federal common law. *Mobil Oil*, 436 U.S. at 625; *see Am. Elec. Power*, 131 S. Ct. at 2537. That is the case here.

Congress has delegated to the Corps authority to investigate solutions for aquatic invasive species in general and Asian carp in particular, to construct and operate the electric barrier system, to study the problem further, and to

implement other solutions through the exercise of its emergency authority, with a goal of integrating solutions into the operation of the CAWS. That "delegation is what displaces federal common law." *Am. Elec. Power*, 131 S. Ct. at 2538. Congress has placed the responsibility for combating the problem with the expert agencies, not the federal courts, which "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* at 2531; 2539-40. Matters such as the location of the invasion front, the efficacy of the electric barriers, the appropriate amount and method of other monitoring efforts, the best long term solutions for the basin as a whole, and the economic impacts of measures to prevent the spread of Asian carp are undoubtedly "scientific, economic, and technological" questions that Congress appropriately left for the agencies to answer. Once the agencies do answer those questions through final agency action, petitioners may obtain judicial review under the APA's traditional arbitrary and capricious standard. *See* 5 U.S.C. § 706(2); *Am. Elec. Power*, 131 S. Ct. at 2540. The agencies are working diligently toward solutions, and the States should not be permitted to short-circuit that process through claims styled as relying on federal common law.

CONCLUSION

This Court should affirm the district court's judgment dismissing the State's complaint with prejudice.

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Rule 32(a)(7)(B)(iii), the brief contains 13,126 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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